No. 4062

United States

Circuit Court of Appeals

For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant in Error.

PETITION FOR REHEARING.

Upon Writ of Error to the United States District Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

No. 4062.

United States

Circuit Court of Appeals

For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant in Error.

Petition and Brief for Rehearing.

The plaintiff in error respectfully petitions for rehearing in the above cause upon the following grounds:

POINT I.

The opinion rendered herein says:

> "The record plainly shows that the general finding that the plaintiff had failed to sustain the averments of the complaint had reference to the merits of the case and not to the formal jurisdictional averment. Furthermore, taking the finding at its face value, it does not show a want of jurisdiction. The test of jurisdiction is the amount claimed in good faith, not the actual

amount in controversy, and there is no finding upon that issue."

The point of practice as well as the facts in the instant case justify us, we believe, in presenting more fully our position and in asking a direct adjudication thereof.

We respectfully submit that if the findings in this case are treated as general, then the determination of all issues necessarily involves the question of the amount in controversy and such finding therefore is adverse on that issue.

In Hill vs. Walker, 167 Fed. 241 (8 C. C. A.), at 256, the Court says:

> "Under the doctrine which we have thus considered, at perhaps too great length, the question of jurisdiction ought to be ruled against the plaintiffs in error. The allegations of citizenship in the complaint satisfy the most exact standards, and there has been no affirmative showing to overcome the *prima facie* case which they create.
>
> "The same result might be reached upon narrower grounds. This cause was tried by the court without a jury, and a general finding made in favor of the plaintiff. It has been repeatedly held by the Supreme Court that an appellate court cannot in such a case look into the evidence for the purpose of deciding whether it supports the finding. If a bill of exceptions is preserved embodying the testimony and the rulings of the court on the trial of the case, the appellate court can only look into such bills of

exception for the purpose of deciding whether the lower court committed error in the course of the trial in its rulings upon questions of evidence and other like matters. Viewing the general denial of the answer in the most favorable light possible for the defendant, it presented the citizenship of the plaintiff as one of the issues in the cause for the decision of the trial court. *That court by its general finding has found this issue, as well as those relating to the merits, in favor of the plaintiff.* Under the ruling of the Supreme Court in the following cases, we are not at liberty to look into the record for the purpose of determining that such finding was not supported by the evidence as to every issue. Norris vs. Jackson, 76 U. S. 125, 19 L. Ed. 608; Insurance Company vs. Folson, 85 U. S. 249, 21 L. Ed. 827; Lehnen vs. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373. See also U. S. Fidelity Co. vs. Board of Commissioners, 145 Fed. 144, and cases cited on page 151, 75 C. C. A. 114."

So here we urge that the court " * * * by its general finding has found this issue, as well as those relating to the merits, in favor of * * * " defendant.

The evidence is not presented, and if the finding is a general one, the presumption of supporting evidence is conclusive.

Under the old practice this jurisdictional question

could be presented only by plea in abatement or special plea.

Barry vs. Edmonds, 116 U. S. 550;
Hill vs. Walker, 167 Fed. 241, at 248.

But more recent cases permit this question to be raised by denial in the answer, especially in all those states which require pleas in abatement and pleas to the merits to be joined in one answer.

Hill vs. Walker, 167 Fed. 241, at 248, et seq.

Roberts vs. Lewis, 144 U. S. 653 (36 L. 579, Point 2 syllabus), reads:

"Since the act of June 1, 1872, all defenses are open to a defendant in the United States Circuit Court under any form of plea, answer or demurrer which would have been open to him under like pleading in the courts of the state within which the Circuit Court is held."

Gilbert vs. David, 235 U. S. 561;
N. P. S. S. Co. vs. Soley, 257 U. S. 216.

For many years the Oregon code required all pleas in abatement to be separately filed and tried before the trial on the merits, but this practice was abolished and Oregon now has, and at the time of the trial of this case had, adopted the rule of the reformed procedure states on this point.

See Oregon Laws 1920, Section 74.

In view of the foregoing, we feel justified in respectfully asking this Court to specify the rule to be followed in this jurisdiction, to wit, whether a special plea or a special defense is necessary to raise jurisdictional questions, or whether they may be

submitted under the general or specific denials and tried together with the merits.

We urge this question not alone because of its relation to the instant case, but so that the rule may be definitely established in this circuit.

The opinion further says:

> "Furthermore, taking the finding at its face value, it does not show a want of jurisdiction. The test of jurisdiction is the amount claimed in good faith, not the actual amount in controversy, and there is no finding upon that issue."

Keeping in mind Oregon Laws, Section 74, which permits the trial of jurisdictional issues and pleas in abatement with the trial on the merits, it is respectfully submitted that the quoted portion of the opinion is unquestionably the law in all states which preserve the distinction between pleas in abatement and their trial, and pleas to the merits and their trial; but, as above shown, this distinction was abolished by Oregon Laws, Section 74. We therefore respectfully urge that the rule stated in

Roberts vs. Lewis, 144 U. S. 653 (36 L. 579), is applicable to Oregon practice and to the instant case.

POINT II.

The findings, as we submit, relate to all the issues, and, if general, the sufficiency of the evidence in support thereof is conclusively presumed, as findings by the Court stand upon the same footing as the verdict by a jury.

Simpkins Federal Procedure, 225.

The Court was required to try all the issues, and

his findings, like the verdict of a jury, must relate to the whole case and determine each issue.

Bowman vs. A. T. & S. F. Ry. Co., 184 Fed. 699.

We again quote from the opinion herein:

> "The test of jurisdiction is the amount claimed in good faith and not the actual amount in controversy, *and there is no finding upon that issue.*" (Italics ours.)

The findings, so construed, show reversible error on the face of the record.

In Roberts vs. Lewis, 144 U. S. 653 (36 L. 579 to 582), the Court says:

> "Under this code, as under the code of New York, upon which it was modeled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of 'each and every allegation in the petition' puts in issue every material allegation therein, as fully as if it had been specially and separately denied. Sweet vs. Tuttle, 14 N. Y. 465; Gardner vs. Clark, 21 N. Y. 399; Donovan vs. Fowler, 17 Neb. 247; Hassett vs. Curtis, 20 Neb. 162; Maxwell Practice (4th ed.), 127, 128; Bliss Code Pleading (2d ed.), Chap. 345. And by express terms of Chap. 94, 96, above cited, an objection that the court has no jurisdiction, either of the person of the defendant, or of the subject of the action, may be taken by demurrer, if it appears on the face of the petition, and by answer if it does not so appear.

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court, which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the citizenship of the parties. Continental Ins. Co. vs. Rhoads, 119 U. S. 237 (30 L. 380)."

Hill vs. Walker, 167 Fed. 241 (at 286) says:

"That court by its general finding has found this issue, as well as those relating to the merits, in favor of the plaintiff."

The findings under consideration are susceptible of one of two constructions only. They either embrace the jurisdictional question or they do not. If they do embrace and determine that question, the judgment should be reversed, and if they do not embrace that question, then it should, nevertheless, be reversed; under the above authorities either conclusion sustains the assigned error.

POINT III.

It is our understanding that questions of jurisdiction are never waived, but can be raised for the first time in the appellate court.

Morrison vs. Burnette, 154 Fed. 617;

Teel vs. C. & O. Ry. Co., 204 Fed. 918.

For the above reasons we believe this petition should be reversed.

Respectfully submitted,
PLATT & PLATT,
MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

United States of America,
State and District of Oregon,—ss.

I, Isham N. Smith, of counsel for plaintiff in error, certify:

That in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

ISHAM N. SMITH.